

State of New Hampshire  
Supreme Court

NO. 2008-0795

2009 TERM

MARCH SESSION

In the Matter of Jonathan Lutz and Crystal Fonteneau

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RULE 7 APPEAL OF FINAL DECISION OF  
HILLSBOROUGH COUNTY (SOUTH) SUPERIOR COURT

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BRIEF OF PETITIONER/APPELLEE JONATHAN LUTZ

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## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Jonathan Lutz, who is 24, and Crystal Fonteneau, who is 26, met during their service in the Army. 1 *Trn.* at 53, 55. Crystal works in the hospital industry, and Jon is a civilian employee of the military. They had a short dating relationship, and Crystal got pregnant. 1 *Trn.* at 55. After exploring options such as abortion and adoption, they got engaged and decided to raise the baby. 1 *Trn.* at 57, 59, 69, 107, 109, 142; 2 *Trn.* at 19, 154. Jenney Lutz was born on December 1, 2006, and is now 2 years old.

It appears from the record that Crystal did not enjoy a warm or present mother figure in her life. 1 *Trn.* at 8, 104, 132, 136, 146; 2 *Trn.* at 119, 149. Jon, on the other hand, comes from a large closely-knit family with a domineering mother. Both before and after Jenney was born, Jon and Crystal spent significant amounts of time attending to their careers and military duties, including overseas postings. 1 *Trn.* at 17, 70- 71; 2 *Trn.* at 44. Consequently, Jenney was left in the care of Jon's mother, Joanne Lutz, for long periods – up to many weeks – at a time.

Given Crystal's insecurity regarding her mothering skills and instincts, and the significant presence of Jon's parents in the young couple's life, the record suggests and Crystal testified that Joanne was overbearing, that Crystal felt she was being judged as incompetent, and that her role as a mother was being usurped. 1 *Trn.* at 26-27, 36, 129, 132, 136; 2 *Trn.* at 30, 33, 38, 40, 55, 64. This culminated in a report by Joanne to the New Hampshire Division of Children, Youth, and Families (DCYF) that Crystal was neglecting Jenney. Since by that time Crystal had moved to her family's home in southern Massachusetts, DCYF referred the case to the Massachusetts Department of Social Services (DSS), which made a preliminary finding of neglect concerning Crystal.

Even if Jon and Crystal's romantic interest might have otherwise sustained them, given their youth, an early and unexpected child, the differences in their family backgrounds, and other factors, reconciliation was impossible, and they abandoned talk of marriage.

Crystal's family and support system is in New Bedford, Massachusetts, near the Rhode Island border. 1 *Trn.* at 17. Jon grew up in Hollis, New Hampshire, where his parents and brothers still reside. Crystal lived in Massachusetts during her pregnancy, and Jenney was born in New Bedford, Massachusetts. 1 *Trn.* at 13, 52, 59. It is about a two-hour drive between the two locations. 1 *Trn.* at 5; 2 *Trn.* at 76.

When Jenney was born, she and Crystal stayed at Crystal's father's house in Massachusetts for one night. 1 *Trn.* at 60-61. After a doctor's appointment, on December 4 when the baby was three days old, Crystal and Jenney joined Jon at their apartment in Manchester, New Hampshire, where they had previously prepared a baby's room. 1 *Trn.* at 52-53, 93; 2 *Trn.* at 21, 22. Jon, the Guardian *ad Litem*, and Joanne all understood that the young family moved to New Hampshire when the baby was born. 1 *Trn.* at 13, 51, 112. Crystal testified that she would have rather lived in Massachusetts, but that because Jon was unwilling to leave New Hampshire, she joined him there. 1 *Trn.* at 18; 2 *Trn.* at 25. She said there was some travel "back and forth" to Massachusetts "[w]hen she had to go to doctor's appointments." 2 *Trn.* at 21-22.

During Crystal's eight-week maternity leave, she lived in New Hampshire with Jon and Jenney, going to Massachusetts for doctor's visits. 1 *Trn.* at 52-53. When Crystal resumed her job in Massachusetts, she stayed some nights there, leaving Jon and Jenney in New Hampshire. 2 *Trn.* at 26. By all reports, Jon is a capable and attentive parent. 1 *Trn.* at 48-49. He brought the

baby to Joanne's house when he was at work, but took care of her when he was home. Crystal testified that Jenney was essentially living at Joanne's house. 2 *Trn.* at 27-28, 42.

Because of the difficult commute, Crystal took a job at the hospital in Concord, New Hampshire, and the family moved from Manchester to Concord in February or March 2007. 1 *Trn.* at 18, 28, 51, 63; 2 *Trn.* at 28; RESPONDENT'S REPLICATION TO PETITIONER'S REPLICATION TO RESPONDENT'S ANSWER AND OBJECTION TO PETITIONER'S PETITION AND REQUEST FOR EX PARTE ORDERS (Oct. 25, 2007), *Appx. to Jon's Brf.* at 15, ¶ 1 (claiming residence in Massachusetts until February 23, 2007). The couple was busy working, and during this period Jenney spent much of her time at Joanne's house in Hollis, New Hampshire. 2 *Trn.* at 28. Jon was posted to Germany as part of his military duties during the summer of 2007, 1 *Trn.* at 17, 70-71, and Crystal left Jenney at Joanne's house for most of the month Jon was away. 2 *Trn.* at 44. Shortly after Jon returned, matters between Crystal and Jon's family deteriorated, the report to DCYF was made, the couple split up, and in July Crystal moved to her father's house in Massachusetts. 1 *Trn.* at 51; 2 *Trn.* at 3.

On August 6, 2007 Jon filed this Parenting Petition, seeking to resolve parenting duties. Probably because of Crystal's demonstrated difficulties and initial lack of interest in mothering, and a number of troubling statements she made regarding her lack of interest in mothering, the court ordered that Jon have primary residential responsibility. The court provided Crystal significant time with Jenney, some of it supervised, and also ordered for Crystal counseling and parenting education services.

The parenting arrangement is not the subject of this appeal. Rather, Crystal has attacked New Hampshire's jurisdiction based on an alleged lack of adequate residency by Jenney, and the presence of the preliminary Massachusetts DSS finding that Crystal was neglectful.

## SUMMARY OF ARGUMENT

Jonathan Lutz notes that Crystal Lutz conceded that Jenney, who was 8 months old when the parenting petition was filed, lived in New Hampshire for either 5 or 5½ months – almost the 6 months necessary for “home state” jurisdiction under the Uniform Child Custody Jurisdiction Act. He points out, as the lower court apparently found, that Jenney in fact lived in New Hampshire for her entire life. He then argues that even if there were some doubt, the court was correct in finding jurisdiction because New Hampshire is where the evidence is concerning Jenney’s care and protection, and because there can be no reasonable allegation that any other state has jurisdiction. He notes that these facts are within the discretion of the trial court.

Jon then argues that whatever issue exists regarding a preliminary Massachusetts finding that Crystal was a neglectful parent, the court below did not consider the matter in its decision, and Crystal did not preserve it.



## ARGUMENT

### I. Jenney Resided in New Hampshire

#### A. Uniform Child Custody Jurisdiction Act

The Uniform Child Custody Jurisdiction Act (UCCJA) has been adopted by both New Hampshire and Massachusetts. RSA 458-A; MASS.GEN.LAWS ch. 209B. Its purpose is to “[a]void jurisdictional competition” in child custody matters, and to “[a]ssure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available.” RSA 458-A:1.

For a child older than six months, jurisdiction is in the “home state” where “the child at the time of the commencement of the custody proceeding has resided with his parents, a parent, or a person acting as parent, for at least six consecutive months.” RSA 458-A:2, V. For a child younger than six months, jurisdiction is in the state where “the child has resided with any of such persons for a majority of the time since birth.” *Id.* Jurisdiction thus follows the residency of the child, not of the parents.

Visits to another state do not affect jurisdiction. *Mattleman v. Bandler*, 123 N.H. 368 (1983). Rather, jurisdiction is where the child’s connections are and where the evidence is. *Id.* The state where the child functioned with her mother and father together as a family unit is presumptively the state with jurisdiction. *Clarke v. Clarke*, 126 N.H. 753, 758 (1985). If a young child has not lived in any state for the requisite six months, the child has no “home state” pursuant to the UCCJA. In that event, courts may combine statutory periods to find the six-month minimum. In *Consford v. Consford*, 711 N.Y.S.2d 199 (N.Y.App.Div. 2000), for

example, the court added a five-month period of the child living in the state, with a different period in which the child functioned as a family unit in the state, which together added to more than six months.

If a child has been abandoned, the state where the child is present may assert jurisdiction. RSA 458-A:3, I(c). Finally, a state has jurisdiction if it “appears that no other state would have jurisdiction.” RSA 458-A:3, I(d)(1).

**B. Where Jenney Lived When**

Jenney was born on December 1, 2006. When this Parenting Petition was filed on August 6, 2007, Jenney was a few days older than eight months.

In her testimony Crystal conceded that Jenney resided in New Hampshire as of March 2007, when she, Jon, and Jenney moved from Manchester, New Hampshire to Concord. 2 *Trn.* at 69, 105-06. In her brief she narrows that date to either March 7 or March 9. CRYSTAL’S BRF. at 5. In pre-trial pleadings Crystal claimed the date was as early as February 23, 2007, making the conceded period of Jenney’s residence in New Hampshire before commencement of this suit just two weeks shy of six months. RESPONDENT’S REPLICATION TO PETITIONER’S REPLICATION TO RESPONDENT’S ANSWER AND OBJECTION TO PETITIONER’S PETITION AND REQUEST FOR EX PARTE ORDERS ¶ 1 (Oct. 25, 2007), *Appx. to Jon’s Brf.* at 15. Crystal has thus conceded that Jenney lived in New Hampshire for least 5 months, and as much as 5½ months, before Jon filed the Parenting Petition.

The only remaining question, therefore, is whether Jenney lived in New Hampshire before March 2007. The evidence in the record is overwhelming that Jenney lived in New Hampshire. Indeed, Crystal has conceded as much. In her brief Crystal wrote that during

February 2007, “Jenney mostly stayed in NH because of the availability of free babysitting through Jonathan’s mother, Joanne Lutz.” CRYSTAL’S BRF. at 16-17.

When Jenney was born, she and Crystal stayed at Crystal’s father’s house in Massachusetts for a single night. On December 4 when the baby was three days old, Crystal and Jenney joined Jon at their apartment in Manchester, New Hampshire, where they had already prepared a baby’s room. Crystal testified that even though she would have preferred Massachusetts, Jon was unwilling to leave New Hampshire, so she joined him in Manchester. Thus she testified that she “stayed in Manchester during the immediate post-partum period.” 2 *Trn.* at 22. Crystal testified that between Jenney’s birth and when she moved to Concord in March, “Jenney was sleeping in the bedroom in a basinet next to the bed with me and Jonathan” in Manchester, New Hampshire. *Id.*

The others involved – Jon and Joanne, as well as the GAL – all understood that Jenney resided in New Hampshire since shortly after she was born. During Crystal’s eight-week maternity leave, Jon testified he lived in New Hampshire with Crystal and Jenney. 1 *Trn.* at 52-53. When Crystal resumed her job in Massachusetts, she testified she stayed some nights there, leaving Jon and Jenney in New Hampshire. 2 *Trn.* at 26.

The most Crystal said regarding Jenney’s contact with Massachusetts was that she took Jenney “back and forth” when “she had to go to doctor’s appointments,” including one in December, one in January, and one in February. 2 *Trn.* at 21-22.

The court’s findings on the jurisdictional facts are in accord with this testimony. RESPONDENT’S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW (Apr. 14, 2008), *Appx. to Crystal’s Brf.* at 58, ¶ 4 (finding granted) (“Crystal and Jenney ... traveled back and forth

between New Bedford and ... Manchester”), ¶ 6 (neither granted nor denied) (“Massachusetts had home state jurisdiction”).

**C. New Hampshire is Only State that has Jurisdiction**

Even if there were some doubt as to where Jenney resided before February 23, 2007, New Hampshire still has jurisdiction. The UCCJA provides for jurisdiction in the state to which the child has the “closest connection” and “where significant evidence concerning his care, protection, training, and personal relationships is most readily available.” The record overwhelmingly supports – and Crystal repeatedly conceded – that Jenney has close connections to not only she and Jon in New Hampshire, but to Jon’s parents in New Hampshire with whom Jenney spent perhaps a majority of her time.

It is further apparent from the record that significant evidence – not including Crystal and Jon – concerning Jenney’s care is in New Hampshire. Jon’s mother, Joanne, testified at length regarding the extensive care, protection, and training she and her family provided Jenney day and night over the course of many months in New Hampshire. Crystal’s father and friend from Massachusetts also testified. Both these witnesses, although obviously caring relations, provided little new information regarding Jenney’s care.

Even without such extended-family connections to New Hampshire, the fact that Jenney resided in New Hampshire for five months combined with the fact that New Hampshire is the only place in which Jenney functioned in a family unit makes New Hampshire her “home state” for the UCCJA. *Clarke v. Clarke*, 126 N.H. at 758; *Consford v. Consford*, 711 N.Y.S.2d at 199.

Thus, to the extent there is any doubt where Jenney lived before March 7 or February 23, such that the six-month prerequisite is not met, the UCCJA’s other provisions nonetheless make

clear that New Hampshire was Jenney's "home state" when Jon commenced this action.

The court below, having recognized this, justifiably informed the parties that "[t]here is no jurisdictional issue here." 1 *Trn.* at 93. When the matter of where Jenney lived repeatedly arose during the trial, however, there was no objection. And – as the extensive citations to the record in both Crystal's and Jon's briefs attest – the court heard plenty of evidence on it.

Finally, no reasonable argument can be made (and none has been advanced) that any state other than New Hampshire has jurisdiction over the custody of Jenney. The jurisdictional prerequisites in Massachusetts are identical to New Hampshire's. MASS.GEN.LAWS ch. 209B § 1 ("Home State" defined as "state in which the child immediately preceding the date of commencement of the custody proceeding resided with his parents, a parent, or a person acting as parent, for at least 6 consecutive months."). Nothing in the record comes anywhere close to suggesting that Jenney lived there for more than a few hours at a time – nowhere near six consecutive months – and in the absence of jurisdiction in Massachusetts, it must be in New Hampshire. RSA 458-A:3, I(d)(1).

Accordingly, New Hampshire is the proper venue in which this Parenting Petition should be heard, and the court below committed no error.

#### **D. UCCJA Jurisdiction Facts Within Discretion of Trial Court**

Findings on a factual matter such as where-the-child-lived-when is squarely within the discretion of the trial court.

The trial court has wide discretion in matters involving custody and visitation. That discretion necessarily extends to matters such as assigning weight to evidence and assessing the credibility and demeanor of witnesses. Conflicts in the testimony, questions about the credibility of witnesses and the weight to be given testimony are for the trial court to resolve. Our review is limited to determining whether it clearly appears that the trial court engaged in an unsustainable exercise of discretion.

*In re Peirano*, 155 N.H. 738, 747 (2007).

Such discretion applies to facts regarding exercise of UCCJA jurisdiction. *See Brauch v. Shaw*, 121 N.H. 562, 566 (1981) (finding of best interest of child to exercise UCCJA jurisdiction for custody modification within discretion of fact-finder). By informing the parties that “[t]here is no jurisdictional issue here,” 1 *Trn.* at 93, the court indicated it found sufficient facts to get over the jurisdictional hurdle. There are sufficient facts in the record here to sustain that finding, and as Crystal has advanced no legal argument, this Court should affirm.

## II. Massachusetts DSS Procedure was Neither Raised nor Considered

In her brief Crystal alleges that there is some problem with the fact that DCYF and DSS investigated her parenting. It is unclear where in the trial-court record this issue is preserved, or even what the issue is. In any case, it does not give rise to any error.

“In custody cases, an error is harmless where it did not affect the outcome of the case and there is no prejudice to the party claiming error.” *Matthews v. Matthews*, 142 N.H. 733, 736 (1998). Here, the court order mentions the matter only in passing:

“Although [Crystal] is in counseling, she still harbors resentment and anger towards father and his family. To a certain extent, this is understandable because of the report to DCYF by the paternal grandmother. The Court is unable to escape that mother may not be able to insulate Jenney from her feelings, at least in the short term.”

FINAL DECREE (Aug. 18, 2008), *Appx. to Crystal’s Brf.* at 65. The additional references to the existence of the DSS report are in the context of who made it and how it made Crystal feel.

RESPONDENT’S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW (Apr. 14, 2008), *Appx. to Crystal’s Brf.* at 58, ¶¶ 35, 36 (findings granted).

In her brief, the most prejudice Crystal can summon from this is that the existence of a DSS report unfavorable to Crystal “may have biased or otherwise colored the decision of the trial court.” CRYSTAL’S BRF. at 13. She posits no evidence of such bias or color.

It is apparent that the procedures for adjudicating neglectful parents in New Hampshire differ from Massachusetts. It is equally apparent that the court below was aware of that, and gave no weight to the DSS report as a basis for making its custody determination. Judges in custody cases are presumed to not consider evidence that is not admissible, *Starkeson v. Starkeson*, 119 N.H. 78 (1979), and to give it the weight it deserves. *In re Noah W.*, 148 N.H.

632 (2002) (“A hearing before a judge without a jury is a circumstance that normally relaxes the strict rules of proof and allows the judge to evaluate evidence without straining it through a fine technical sieve.”).

Crystal has already received the remedy she requests – that the neglect report not be taken into account. Because there is no prejudice, whatever error the court may have committed is therefore harmless.

Finally, to the extent an issue exists, it was not preserved. For preservation, Crystal points to a portion of the transcript in which she testified that the Massachusetts DSS procedure had not yet been completed and its finding of neglect was preliminary, and that Crystal requested a more thorough investigation because she felt the preliminary finding was not fair. *2 Trn.* at 67-68. Nowhere did she raise any legal error that the Massachusetts procedure does not comport with due process or should not be given full faith and credit. Regardless, the court appears to have given the Massachusetts finding no or little weight.



**CONCLUSION**

For the foregoing reasons, Jonathan Lutz respectfully requests this Court affirm the findings of the court below.

Respectfully submitted,

Jonathan Lutz  
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: March 30, 2009

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**REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Counsel for Jonathan Lutz requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issue regarding jurisdiction over very young children is novel in this jurisdiction

I hereby certify that on March 30, 2009, copies of the foregoing will be forwarded to Xiorlivette C. Bernazzani, Esq., and to Barbara B. Millar, Esq., GAL.

Dated: March 30, 2009

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Joshua L. Gordon, Esq.

**APPENDIX**

1. RESPONDENT’S REPLICATION TO PETITIONER’S REPLICATION TO RESPONDENT’S ANSWER AND OBJECTION TO PETITIONER’S PETITION AND REQUEST FOR EX PARTE ORDERS (Oct. 25, 2007) ..... 15